United States Court of Appeals

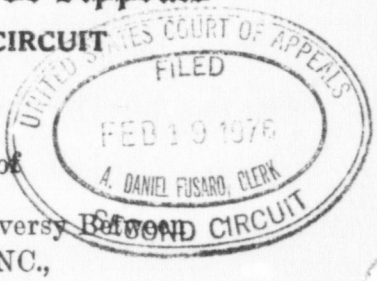
for the Second Circuit

APPELLEE'S BRIEF

75-7614

To be argued by
KURT J. WOLFF

United States Court of Appeals
FOR THE SECOND CIRCUIT



In the Matter of

the Arbitration of a Controversy Between

KNIT-AWAY, INC.,

Petitioner-Appellee,

—and—

L.W. FOSTER SPORTSWEAR CO., INC.,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE KNIT-AWAY, INC.

OTTERBOURG, STEINDLER, HOUSTON & ROSEN, P.C.
Office and P.O. Address
230 Park Avenue
New York, New York 10017
(212) 679-1200

Of Counsel:
KURT J. WOLFF
DANIEL WALLEN

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BRIEF OF APPELLEE KNIT-AWAY, INC.

Counterstatement of the Issue Presented

Was it reversible error for the District Court to grant the removed Petition (originally filed in New York State Supreme Court) of Petitioner-Appellee Knit-Away, Inc. ("Knit-Away") to compel arbitration of disputes between Knit-Away and Respondent-Appellant, L.W. Foster Sportswear Co., Inc. ("Foster") where the undisputed and documentary evidence and judicial admissions established that:

A. Both Knit-Away and Foster were merchants in the textile industry and corporations licensed to do business in New York;

B. Foster orally asked Knit-Away to agree to sell Foster a large quantity of textiles and following such oral request, and in confirmation of the transactions, Knit-Away sent to Foster, over a period of five months, a series of twenty textile industry standard confirmations (contracts), each of which contracts was actually received by Foster, and retained by Foster, without objection;

C. Each of these twenty contracts contained on the face thereof, printed in six-point, bold face, capital type, the legend "TERMS AND CONDITIONS OF CONTRACT" and immediately below such legend, also printed in six-point type on the face of the contract

> "This confirmation is given subject to all of the terms and conditions on the face and reverse sides hereof, *including the provisions for arbitration* and exclusion of warranties all of which are accepted by Buyer, supersede Buyer's order form, if any, and constitute the entire contract between Buyer and Seller. Buyer shall be deemed to have assented to all of the terms and conditions hereof, and this confirmation shall become a contract for the entire quantity specified either when . . . (b) *Buyer receives and retains this confirmation without objection for ten days* or (c) *Buyer accepts delivery of all or any part of the merchandise ordered hereunder*, . . ." (Emphasis supplied).

D. Each of these twenty contracts which Foster received and retained without objection contained, also printed in six-point type, an arbitration clause which stated, in rele-

vant part, that "Any controversy arising out of or relating to this contract shall be settled by arbitration in the City of New York. . . ."

E. Subsequent to Foster's receipt and retention without objection of these twenty contracts, Knit-Away shipped and delivered to Foster, and Foster accepted the textiles described in said contracts, and with each such shipment of textiles under and pursuant to the said contracts, Knit-Away sent an invoice covering such shipment which specifically referred, by contract number, to the contract under which the shipment was being made;

F. Foster actually used all, or virtually all of the textiles thus delivered to it in manufacturing garments which Foster, in turn, sold to its own customers;

G. When disputes between Knit-Away and Foster arose, Foster itself acknowledged in writing that these disputes between it and Knit-Away were arbitrable in that Foster, through the attorneys who presently represent it on this appeal prepared, served and filed with the American Arbitration Association Foster's own written Demand for Arbitration in which Foster stated that it and Knit-Away were parties to a "written contract" to arbitrate disputes and in which Demand for Arbitration Foster actually purported to quote verbatim from the arbitration clause in the "written contract" between the parties and, moreover, sought modification of the "written contract" (arbitration clause) so that the arbitration pursuant thereto would take place in Philadelphia rather than in New York as called for in the arbitration clause as written;

H. Foster and Knit-Away agreed, in the Court below, that the law applicable to the determination of Knit-Away's Petition to Compel Arbitration was the Federal Arbitration Act and/or New York law.

On these admitted and indisputable facts, it can be fairly stated not only that the decision of the District Court did not constitute "reversible error", but also, and affirmatively, that the District Court was entirely correct and that any other determination would have been "clearly erroneous" on the facts and contrary to well settled law.

Counterstatement of the Case

Knit-Away brought a special proceeding under Article 75 of the New York Civil Practice Law and Rules (CPLR) in the Supreme Court of the State of New York, County of New York against Foster to compel arbitration, under a series of twenty (20) written contracts, of disputes which had arisen between the parties. Foster removed that special proceeding to the United States District Court for the Southern District of New York and opposed Knit-Away's petition. The District Court (Hon. Charles E. Stewart, U.S.D.J.) concluded:

> ". . . that arbitration is properly compelled here, both under the Federal Arbitration Statute, 9 U.S.C. § 4 and the New York CPLR § 7503."[1]

An Order (136a-141a) and a Judgment (135a) compelling Foster to proceed in arbitration was made by the District Court and Foster has appealed to this Court (142a) from such Order and Judgment.

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[1] Neither party in the Court below urged the applicability of any law other than that of the State of New York and the Federal Arbitration Statute. Knit-Away specifically urged the applicability of New York law and Foster did not disagree. Indeed, in the memoranda of law which are a part of the Record on Appeal (although they have not been reproduced in the Appendix) both parties cited only New York and/or federal decisions to the District Court.

The operative facts are really not in dispute nor are they disputable, resting, as they do, largely on documentary evidence as well as on Foster's admissions and concessions made before and during the course of the proceedings in the District Court. Unfortunately, Foster's Brief in this Court omits many of the relevant facts, and distorts others, so that it is necessary for Knit-Away, in its Brief, to now set forth a full statement of the case.

Both Knit-Away and Foster are merchants in the textile industry. Knit-Away is engaged principally in the manufacture and sale of textiles and related items (5a). It is a corporation organized under the laws of the State of North Carolina and is authorized to do business in the State of New York (5a). Foster is engaged principally in the business of manufacturing men's clothing (6a). It is a corporation organized under the laws of the State of Pennsylvania and it too is authorized to do business in the State of New York (5a-6a, 94a).

Foster claims that it orally requested that Knit-Away agree to sell Foster a large quantity of textiles (123a) which were to be used by Foster in manufacturing men's clothing (98a). Between September 12, 1974 and February 17, 1975 (a five-month period), Knit-Away sent to Foster a series of twenty "documents" described by Knit-Away (131a) as "industry standard form[s] of contract". Each of the "documents" states *on the face thereof* that it is "confirmation of" a purchase of fabric by Foster from Knit-Away. On the face of each of these twenty "documents" there is contained in six point, bold face, capital type the printed legend:

"TERMS AND CONDITIONS OF CONTRACT"

and immediately after that printed legend, there is printed in six point, lower case type, the following:

> "*This confirmation is given subject to all of the terms and conditions on the face and reverse sides hereof, including the provisions for arbitration* and exclusion of warranties all of which are accepted by Buyer, supersede Buyer's order form, if any, and constitute the entire contract between Buyer and Seller. *Buyer shall be deemed to have assented to all of the terms and conditions hereof, and this confirmation shall become a contract for the entire quantity specified either when* (a) this confirmation is signed and returned by Buyer to Seller and accepted in writing by Seller, or (b) *Buyer receives and retains this confirmation without objection for ten days*, or (c) *Buyer accepts delivery of all or any part of the merchandise ordered hereunder*, or when Buyer has given to Seller specification of assortments, delivery dates, shipping instructions or instructions to bill and hold or when Buyer has otherwise assented to the terms and conditions hereof." (Emphasis supplied).

Then, in six point, bold face, capital type there is printed:

"CONTINUED ON REVERSE SIDE."

On the reverse side of each of these twenty "documents" there are additional terms and conditions of contract, also printed in six point type. This additional contractual language is printed immediately below a legend printed in nine point, bold face, capital type and underlined stating:

"TERMS AND CONDITIONS OF CONTRACT"

Copies of the face of each of these "documents" are reproduced in the Appendix (13a-32a) and the identical reverse

side of each of these "documents" is found at page 33a of the Appendix. It is important to note that the reproductions found in the Appendix are reduced in size from the actual documents which were sent by Knit-Away to Foster. In the Appendix, the size of the "document" appears to be approximately 8" x 8", but the actual "document" is 10¾" x 11". The result is that the copies which the Court has, show the type as about one-third (⅓) smaller than it really is. In submitting copies of these "documents" to the District Court, Knit-Away tried to call the attention of the District Court to the fact that such copies had been reduced in size, in the reproduction process, from the originals (103a).

In the District Court, Foster decided that it would suit its convenience to call these "documents" "invoices" (124a, 138a). In this Court, Foster has abandoned that contention and now decides to call these "documents" "shipment advices". This kind of semantic mumbo jumbo cannot serve to change the character of the "documents" which are clearly labeled as contracts. We (like the District Court at 139a) have no hesitancy in describing these "documents" by the precise word used in the "documents" themselves, i.e., CONTRACTS.

Each of these twenty contracts also contained the following provision, also printed in six point type:

> "15. ARBITRATION: Any controversy arising out of or relating to this contract shall be settled by arbitration in the City of New York in accordance with the Rules then obtaining of the General Arbitration Council of the Textile Industry. The arbitrators sitting in any such controversy shall have no power to alter or modify any express provision of this contract, including without limitation, the provisions

> of paragraph 6 applicable to claims, or to render any award which by its terms effects any such alteration or modification. The parties consent to the jurisdiction of the Supreme Court of the State of New York, and of the United States District Court for the Southern District of New York, and, this sale being an interstate commerce, to jurisdiction under the Federal Arbitration Act as well as the arbitration statutes of the State of New York, for all purposes in connection with said arbitration. The parties further consent that any process or notice of motion or other application to either of said Courts or a Judge thereof, may be served inside or outside the State or Southern District of New York by registered or certified mail, return receipt requested, or by personal service provided a reasonable time for appearance is allowed, or in such other manner as may be permissible under the Rules of said Court."

In Foster's answer to Knit-Away's petition, Foster admitted (97a) that it had received and retained each and every one of these twenty contracts. Foster did not claim that it ever objected to any one of them.

Also, in Foster's answer to Knit-Away's petition, Foster further admitted (97a-98a) that it had received the merchandise (textiles) delivered to it by Knit-Away and, indeed, that it not only used that merchandise (approximately 196,000 yards of fabric) in manufacturing garments, but also that it actually sold, to its own customers, the garments thus manufactured by it (98a).

Furthermore, each and every time that Knit-Away shipped fabric under the contracts hereinabove referred to, it also sent an invoice covering such shipment of fabric.

Such invoice, among other things, specifically referred by contract number to the contract under which the shipment was made and invoices rendered. Copies of all the invoices in respect of the shipments of fabric involved in the arbitration were annexed as an exhibit to the petition and are found at 46a through 85a of the Appendix. Not less than one hundred invoices were sent to Foster and received and retained without objection. Thus, when the fabric was actually delivered to Foster, and thereafter accepted, and used, it was accepted pursuant to the contract which is referred to on the invoice. The contract numbers on the open invoices are, of course, the contracts involved in the arbitration. This was additional proof, if additional proof were needed, that the parties were operating under and pursuant to these written contracts.

Since the contracts (or "invoices" as they were called by Foster in the lower court or "shipment advices" as they are called by Foster in this Court) concededly contain the provision

> "Buyer shall be deemed to have assented to all of the terms and conditions hereof, and this confirmation shall become a contract for the entire quantity specified either when . . . (b) Buyer receives and retains this confirmation without objection for ten days, or (c) Buyer accepts delivery of all or any part of the merchandise ordered hereunder. . . .",

it follows that these "documents" became the contracts between the parties under either of the above noted two alternative (and independent) provisions, i.e., receipt and retention without objection and/or acceptance of delivery of all or part of the merchandise.

Additionally, Knit-Away claimed in its Reply Affidavit (132a) upon information and belief, that: (a) Foster also

"purchases fabric from other companies such as J. P. Stevens, Inc., Burlington Industries, etc."; (b) each of "these fabric suppliers use virtually the identical form of contract (confirmation) as was used" by Knit-Away; (c) Stevens and Burlington used such contracts "precisely in the same fashion" as Knit-Away did, i.e., oral "orders from Foster followed by written confirmations (contracts) from the seller"; and (d) Foster was thus "no stranger to this judicially noticed textile practice" (132a). Indeed, every buyer in the textile industry is aware that almost all textile mills use virtually the same form of contract containing an arbitration clause and this practice was judicially noticed more than twenty years ago by the New York State Court of Appeals (see Point I, *infra*). Foster did not deny this claim in the District Court and it does not deny that claim in this Court. Moreover, Knit-Away described its contracts as "industry standard form[s]" (131a), a description to which Foster did not object.

The accounts receivable generated by these sales of merchandise from Knit-Away to Foster were factored by Knit-Away with its factor, Southeastern Financial Corp. (9a). By the 1st day of April, 1975, Foster had failed to pay for such merchandise to the extent of $380,100.15 (9a). Subsequent to April 1, 1975 (but before April 16, 1975) Foster paid $11,541.35 to Knit-Away on account of invoices rendered to Foster under contracts with Knit-Away which invoices specifically refer to the contracts containing arbitration clauses by number. On or about April 16, 1975, Foster drew its check (43a) in the sum of $44,960.13 which it forwarded not to Knit-Away, but to Knit-Away's factor (9a). On the back of the check (44a) Foster had typed in the following language:

> "Endorsement of this check constitutes payment in full of all claims of Kint-Away, Inc. [sic] against

> L.W. Foster Sportswear Co., Inc., arising from shipments represented by invoices and credit memos attached."

When Knit-Away was apprised of this event, and on April 21, 1975, it sent to Foster, registered mail, return receipt requested, a letter (45a) in which Knit-Away stated:

> "We are accepting your check #17902 dated April 16, 1975 in the sum of $44,960.13 under protest and without prejudice to our right to recover all sums due us."

The registered mail return receipt from the United States Postal Service conclusively establishes that such letter was received by Foster on April 22, 1975 (45a).

On April 23, 1975 (119a), the day *after* Foster received written notification from Knit-Away that Foster's $44,960.13 check would not be accepted in full payment of the approximate indebtedness (at that time) of $369,000.00, Foster, through its own attorneys (who also represent Foster in the District Court and in this Court) prepared and thereafter served and filed with the American Arbitration Association ("AAA") a written Demand for Arbitration (119a-120a) in which Foster solemnly asserted that it and Knit-Away were parties to a "written contract . . . providing for arbitration."[2]

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[2] On this appeal, and in the District Court, Foster and its attorneys contend that the Demand for Arbitration which they prepared and served and which: (a) explicitly states that Knit-Away and Foster are parties to "a written contract"; and which (b) quotes verbatim, the arbitration clause of the written contract, was predicated, not upon any written contract, but solely on some ephemeral and ill-defined non-binding and presumably oral agreement. Foster has never bothered to explain how it can file one legal document (a Demand for Arbitration) solemnly subscribed by its counsel alleging the existence of a written contract to arbitrate and thereafter, in other legal documents, including affidavits and briefs, take a contrary posi-

In Foster's Demand for Arbitration, *Foster not only was able to quote verbatim the arbitration clause contained in that written contract, but also requested a modification of the written contract (arbitration clause) so that the arbitration pursuant thereto would take place in Philadelphia rather than in New York, as called for in the arbitration clause* as written.

On May 2, 1975, Foster's attorneys, by letter of that date, and without further explanation, asked that the AAA "kindly withdraw the demand for arbitration filed in the above matter without prejudice." (121a)

In short, contrary to the assertion now made by Foster in this Court to the effect that it started its arbitration *before* it was advised that Knit-Away refused to accept the $44,960.13 as payment in full, the documentary evidence (45a) establishes that Foster actually started that arbitration only *after* it received actual written notice that such check was not being accepted in full payment. Further, contrary to the assertion made in the District Court and in this Court that there was never any written agreement to arbitrate disputes, Foster itself served and filed a legal document subscribed on its behalf by its attorneys (Demand for Arbitration) in which it asserted not only the very existence of a written agreement to arbitrate, but also asked that such written agreement be modified or amended so that arbitration would be held in Philadelphia, not in New York, as the written agreement then required.

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tion. We respectfully submit that Foster's conduct can easily be explained by the fact that Foster, who is indebted to Knit-Away in the principal sum of approximately $280,000.00, is merely trying to delay the collection of a just debt. Indeed, one would suspect that if Knit-Away instituted a litigation, Foster would have, in furtherance of its dilatory tactics, moved for a stay of that litigation in favor of arbitration.

As soon as Knit-Away learned of Foster's duplicity in seeking to terminate arbitration proceedings which Foster had itself initiated, Knit-Away commenced its own arbitration at the AAA (General Arbitration Council of the Textile Industry Division) by service of its "Demand for Arbitration and Notice of Intention to Arbitrate" dated May 5, 1975 and served and filed on the same date (86a). When Foster confirmed to Knit-Away that Foster would resist arbitration (102a), Knit-Away served and filed, pursuant to New York Law, a notice of petition (dated May 7, 1975) and petition (dated May 6, 1975 and verified May 7, 1975), seeking an order from the New York State Supreme Court compelling arbitration.

Twelve days after the commencement of the special proceeding by Knit-Away in the State Court, Foster filed its removal petition in the United States District Court for the Southern District of New York alleging that removal was predicted upon the existence of diversity of citizenship with the matter in controversy exceeding $10,000.00 (94a). It is conceded that the case was properly removed to the District Court on such basis, i.e., diversity.

Sixteen days after the case was removed to the District Court, Foster filed its answer to Knit-Away's petition. Foster's answer concedes (97a) the receipt and retention not only of the contracts, but also of the merchandise referred to in those contracts. The answer further concedes the actual use of the merchandise (98a) and acknowledges receipt of Knit-Away's letter rejecting the conditions upon which the $44,960.13 check was tendered.

Foster's answer enumerated three defenses as forming the basis for its refusal to proceed with arbitration.[3] The

[3] In this Court, Foster advances many arguments which were never made to the District Court. Indeed, in at least one case, Foster is

first defense (99a) was that Foster had never agreed in writing to arbitrate any disputes. Foster presses that point in this Court. The second defense (99a) was that there was an accord and satisfaction between the parties subsequent to the time the dispute arose and that, therefore, there is nothing to arbitrate. That defense has been abandoned in this Court. The third defense (99a-100a) was that there was some vague and ill-defined agreement which allegedly superseded the written contracts between the parties (assuming, presumably *arguendo* only, that there was a written contract between the parties). This defense has also been abandoned in this Court.

Subsequent to the service and filing of Foster's answer, two additional affidavits (and exhibits) were filed with the Court on behalf of Knit-Away's petition and one additional affidavit was filed by Foster on behalf of its position. The affidavits and exhibits are part of the appendix. In none of these papers did either party request an opportunity to present live witnesses and oral testimony nor did either party ask to be further heard in the District Court.

On October 1, 1975 the District Court made its determination compelling arbitration (136a-141a) and on October 24, 1975 a judgment granting Knit-Away's petition was filed (135a). This appeal followed (2a).

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urging a position on this Court which is directly contrary to the position that it took below. That is, Foster now claims that the applicable law is other than the law of the State of New York and/or the Federal Arbitration Act. In the lower Court, Foster did not urge the applicability of any law other than the law of the State of New York and the Federal Arbitration Act. The decision of the District Court, moreover, confirms that the matter was presented to that Court on the basis of the applicability of the New York law and the Federal Arbitration Act (140a).

ARGUMENT

Introduction

Knit-Away's notice of petition, petition, and Briefs in the District Court urged that the governing law was the law of the State of New York and/or the Federal Arbitration Act. Neither in Foster's answer nor in its affidavit in opposition to the Petition did Foster contend that the New York law or the Federal Arbitration Act was inapplicable, much less did it urge that the law of some other jurisdiction was applicable. Indeed, a reading of Foster's Brief in the District Court makes it clear that Foster either conceded, or actually agreed, that the applicable law was the New York law and/or the Federal Arbitration Act. It is, therefore, no surprise that the District Court, in its decision, applied the New York law and/or the Federal Arbitration Act.

For the first time, on appeal to this Court, Foster urges the applicability of Pennsylvania Law (it apparently also urges the applicability of Tennessee, North Carolina and California Law since it cites in its brief cases purporting to apply the law of those states). However, that argument by Foster may not be considered by this Court since the cases are legion that an appellant is foreclosed from pleading or presenting to the Court of Appeals an issue that was not before the District Court.

Terkildsen v. *Waters*, 481 F. 2d 201 (2d Cir. 1973);

Fortunato v. *Ford Motor Co.*, 464 F. 2d 962 (2d Cir. 1972), *cert. den.* 409 U.S. 1038 (1972);

United States v. *Vitasafe Corp.*, 352 F. 2d 62 (2d Cir. 1965);

Schwartz v. *S.S. Nassau*, 345 F. 2d 465 (2d Cir. 1965), *cert. den.* 382 U.S. 919 (1965);

River Plate & Brazil Co. ... ences v. *Pressed Steel Car Company, Inc.*, 227 F. 2d 60 (2d Cir. 1955);

Libbey-Owens-Ford Glass Co. v. *Sylvania Industrial Corp.*, 154 F. 2d 814 (2d Cir. 1946), *cert. den.* 328 U.S. 859 (1946).

Accordingly, in the legal argument that follows, we will not address ourselves to the question of what the law of these other jurisdictions is nor will we address ourselves to the question of whether or not such other law is applicable to the issues in this case.

In addition, it is Knit-Away's position that, placing all other legal and factual considerations aside, Foster expressly assented to the arbitration provision in the contracts by its commencement of an arbitration proceeding in which it alleged and affirmed the existence of a binding "written contract" to arbitrate. Such act of Foster is therefore determinative of this appeal.

POINT I

Knit-Away and Foster are parties to written agreements containing provisions requiring arbitration.

A. In New York, as Between Merchants in the Textile Industry, an Oral Order by the Buyer, Followed by Written Confirmation (Containing an Arbitration Clause) from the Seller to the Buyer, Gives Rise to a Binding Agreement to Arbitrate Where the Written Confirmation is Retained, Without Objection, by the Buyer.

This is yet another in the long line of cases between merchants in the textile industry in which a buyer and seller of textiles do business over a period of time on the basis of a series of written sales contracts. Invariably, the buyer places an oral order for textiles. The seller then prepares contracts or confirmations and delivers them to

th[illegible]er. Each of the contracts contains industry standard provisions, including a provision for arbitration of disputes. Each of such contracts is retained, without objection, by the buyer. Thereafter, textiles are invoiced and shipped pursuant to the written contracts and those invoices and textiles are delivered to, and accepted by, the buyer. Subsequently, and almost invariably after the buyer has used the textiles, the buyer either refuses to pay, or stops paying, for the textiles. When the seller seeks arbitration to collect the balance which is due and owing, the buyer suddenly "discovers" that it never agreed in writing to arbitrate its disputes, and the seller then finds that if it wants to proceed in arbitration, it must invest the time and expense of a legal proceeding to compel arbitration.

This [illegible] presents that "standard" script with only one slight modification: in this case, the buyer itself initiated an arbitration proceeding (which it subsequently unilaterally withdrew), in which arbitration proceeding the buyer itself alleged the existence of a written contract requiring arbitration of disputes.[4]

As long ago as 1954, the New York State Court of Appeals recognized that in the *textile* industry[5] merchants

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[4] In Point II of this brief, pages 34-36, *infra*, we will show that Foster's conduct, and the arguments advanced, make it abundantly clear that this is a frivolous appeal, within the meaning of Rule 38 of the Federal Rules of Appellate Procedure and that this Court should, therefore, require Foster to pay Knit-Away's counsel fees as well as double costs and disbursements of this appeal.

[5] For the first time on this appeal, Foster argues that it is not a member of the textile industry. In this connection, it must be observed that Foster's full name is L. W. Foster *Sportswear* Co., Inc. Foster manufactures a *textile* product, i.e., men's wearing *apparel*, from *textiles* which it buys. Foster then sells this *textile* product to its own customers. Thus, the claim that Foster is not a member of the textile industry is yet another of the myriad "Alice in Wonderland" arguments which Foster advanced in the District Court and in this Court . . . and the mere making of such frivolous arguments establishes the utter lack of merit of the appeal.

contemplate that the seller will follow an oral order from a buyer with a written confirmation which contains standard terms and conditions, including a provision for arbitration. Indeed, the Court of Appeals stated:

> "From our own experience *we can almost take judicial notice that arbitration clauses are commonly used in the textile industry . . .*" *In the Matter of Helen Whiting, Inc.*, 307 N.Y. 360 at 367 (1954). (Emphasis supplied.)

See Domke, Commercial Arbitration § 2.02.

Since the decision in *Whiting, supra,* the New York appellate and lower Courts have invariably found that as between merchants in the textile industry, there is a written agreement to arbitrate disputes where there is an oral order by the buyer, followed by the seller's delivery to the buyer of a written contract, containing a provision for arbitration of disputes, where the buyer receives and retains, without objection, the written confirmation of the oral order.

In the Matter of Suits Galore, Inc., 372 N.Y.S. 2d 686 (1st Dept. 1975);

Loudon Manufacturing, Inc. v. *American & Efird Mills, Inc.*, 46 A.D. 2d 637, 360 N.Y.S. 2d 250 (1st Dept. 1974);

Braten Apparel Corp. v. *Rutger Fabrics Corp.*, 35 A.D. 2d 921, 318 N.Y.S. 2d 771 (1st Dept. 1970);

Trafalgar Square Ltd. v. *Reeves Bros., Inc.*, 35 A.D. 2d 194, 315 N.Y.S. 2d 239 (1st Dept. 1970);

In re C. M. I., Clothesmakers, Inc., 17 U.C.C. Rep. Ser. 911 (Sup. Ct. N.Y. Co. 1975);

In re Dalil Fashions, Inc., 12 U.C.C. Rep. Ser. 478 (Sup. Ct. N.Y. Co. 1973);

Silverstyle Dress Co. v. *Aero-Knit Mills, Inc.*, 11 U.C.C. Rep. Ser. 292 (Sup. Ct. N.Y. Co. 1972);

Wayne Wearer Mills, Inc. v. *Coit International Inc.*, 10 U.C.C. Rep Ser. 1172 (Sup. Ct. N.Y. Co. 1972);

Better Togs, Inc. v. *Abaco Fabrics*, 8 U.C.C. Rep. Ser. 1230 (Sup. Ct. N.Y. Co. 1971);

Aaron Kamhi, Inc. v. *Vanity Fabrics, Inc.*, 4 U.C.C. Rep. Ser. 481 (Sup. Ct. N.Y. Co. 1967);

In re Wearabouts, Inc., 4 U.C.C. Rep. Ser. 302 (Sup. Ct. N.Y. Co. 1967);

Semigran Lingerie Co., Inc. v. *Greenwood Mills, Inc.*, N.Y.L.J. p. 17, December 29, 1966;

See also: In the Matter of Deering Milliken, Inc., 374 N.Y.S. 2d 662 (1st Dept. 1975).

Trafalgar Square, supra, unquestionably stands for the proposition that the language of U.C.C. § 2-201(2):

> ". . . clearly indicates that the one who receives a 'writing' in confirmation of a 'contract' has the burden of objecting to its contents within ten days." 315 N.Y.S. 2d at 242.

Foster seeks to distinguish this well-settled proposition of New York law by suggesting that an:

> ". . . erroneous interpretation of that provision [U.C.C. § 2-201(2)] has crept into certain nisi prius decisions by the New York Supreme Court, in which a buyer's failure to object within ten days to a written confirmation has been held to render an arbitration

> clause thereby binding on the buyer if the buyer had reason to know that the confirmation contained an arbitration clause" (Foster's Brief at 24).

Foster's counsel (who are not members of the New York bar) attribute this "erroneous interpretation" to a "misinterpretation" by the *nisi prius* Justices of the New York Supreme Court of the *Trafalgar Square* decision. Foster contends that:

> "[S]everal [New York] Supreme Court decisions have misunderstood *Trafalgar* and have construed it as having dealt with the content of the actual agreement between the parties as well as the formalities required by the statute of frauds (citing cases)" (Foster's Brief at 24-25).

It is respectfully submitted that Foster's Brief to this Court either shows a total unfamiliarity with the law of the State of New York or a blatant attempt on counsel's part to mislead this Court by failing to cite three decisions by the Supreme Court, Appellate Division, First Department, rendered subsequent to *Trafalgar Square:*

> *In the Matter of Suits Galore, Inc.*, 372 N.Y.S. 2d 686 (1st Dept. 1975);
>
> *Loudon Manufacturing, Inc.* v. *American & Efird Mills, Inc.*, 46 A.D. 2d 637, 360 N.Y.S. 2d 250 (1st Dept. 1974);
>
> *Braten Apparel Corp.* v. *Rutger Fabrics, Corp.*, 35 A.D. 2d 921, 318 N.Y.S. 2d 771 (1st Dept. 1970).

Braten Apparel, supra, was unanimously decided by the First Department less than one month after that Court's

unanimous decision in *Trafalgar Square*.[6] In *Braten Apparel*, the First Department held that an arbitration clause in a contract for the sale of goods was effective between merchants in the textile industry although it was not signed.

The First Department had occasion to review the wisdom of the *Trafalgar Square* and *Braten Apparel* decisions in 1974, in *Loudon Manufacturing, Inc.* v. *American & Efird Mills, Inc., supra*. If Foster's attorneys would have found this case, they would have seen the following language of another unanimous Court:

> "Twenty years ago the Court of Appeals said: 'From our own experience, we can almost take judicial notice that arbitration clauses are commonly used in the textile industry . . .' [citing *Whiting*]. *The experience to date has added strength to this observation. A written order following an oral agreement is the usual and recognized contract between the parties and has become part of our statutory law* (U.C.C. § 2-201(2))." 360 N.Y.S. 2d at 251 (Emphasis supplied.)

The third and most recent First Department decision which Foster's counsel apparently overlooked presents a

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[6] Foster's Brief at page 24 places great reliance upon the fact that the *Trafalgar Square* decision was by a "four-man panel". Foster's counsel apparently do not understand that our Appellate Division doesn't sit *en banc*. In any event, what Foster describes as a "four-man panel" consisted of Presiding Justice Stevens and Associate Justices Capozzoli, McGivern and Steuer. Moreover, three more Justices of the First Department (Markewich, Nunez and Bastow) joined with Justice Steuer in deciding the *Braten Apparel* case. Thus, seven Justices of the Supreme Court, Appellate Division, First Department, agreed with the decision in *Trafalgar Square*. Therefore, for Foster's counsel to claim that the *nisi prius* Justices of the Supreme Court have been consistently misinterpreting *Trafalgar Square* must be charitably characterized as inaccurate.

strikingly similar set of facts to the case at bar: *In the Matter of Suits Galore, Inc., supra.* In that case, as in the case at bar, the buyer of textiles received and retained, without objection, the contracts in issue, each of which contained a broad arbitration clause. Moreover, in *Suits Galore,* the textiles were subsequently delivered to and accepted by the petitioner (as is the case with Foster). *Most significantly, as in the case at bar, the invoices in Suits Galore which were issued for each of the shipments contained a reference to the particular contract involved.* Under the circumstances, the First Department unanimously concluded that the petitioner was bound by the arbitration clauses contained in the contracts. In reaching its decision, the Court cited approvingly both the *Helen Whiting* and *Trafalgar Square* decisions.

In view of the foregoing, it is abundantly clear that any claim on the part of Foster to the effect that it "never agreed in writing" to arbitrate disputes with Knit-Away does not have the slightest basis in law.

B. Even if the Uniform Commercial Code were Disregarded, Knit-Away and Foster are as a Matter of Fact Under Common Law Parties to Written Agreements Containing Provisions Requiring Arbitration.

Foster concedes that it orally requested that Knit-Away sell to it substantial quantities of textiles. Foster further admits that, thereafter, it received a series of twenty contracts confirming the terms of the sale, which contracts were received and retained by it without objection.[7] It is likewise

[7] Only sixteen of these twenty contracts are involved in the arbitration for the reason that Foster actually paid for the textiles delivered under four of the contracts.

conceded by Foster that it subsequently received and used the textiles referred to in the series of twenty contracts.

On the face of each of these twenty contracts, under the printed six-point, bold face, capital type heading "TERMS AND CONDITIONS OF CONTRACT", is printed the following (also in six-point type):

> ". . . Buyer shall be deemed to have assented to all of the terms and conditions hereof, and this confirmation shall become a contract for the entire quantity specified either when (a) this confirmation is signed and returned by Buyer to Seller and accepted in writing by Seller, or (b) *Buyer receives and retains this confirmation without objection for ten days,* or (c) *Buyer accepts delivery of all or any part of the merchandise ordered hereunder. . . .*" (Emphasis supplied.)

This printed language is not difficult to understand nor is it ambiguous in the slightest degree. The quoted language tells Foster that there will be a contract between the parties upon the happening of *any one* of several alternative events . . . events which Foster could control. Thus, there will be a contract if Foster "receives and retains" the confirmation "without objection for ten days". Likewise, the confirmation becomes a contract if Foster "accepts delivery of all or any part of the merchandise ordered" thereunder. Since Foster concedes that it received and retained the twenty confirmations without objection, it is clear that under this provision, Foster accepted the confirmations as "the contracts between the parties" in one of the precise alternative methods provided for. In addition and alternatively, Foster also accepted the confirmations as "the contracts between the parties" by ac-

cepting delivery "of all or any part of the merchandise" ordered thereunder.

In short, under elementary common law principles of contract, taught to first-year law students, Foster manifested its acceptance of these confirmations as the contracts between the parties in two alternative and entirely separate and distinct fashions.

Even before the adoption of the Uniform Commercial Code, the New York State Courts recognized that a party's acceptance of a written agreement could be manifested by such party's conduct although the party never actually signed the contract.

> *Newburger* v. *American Surety Company*, 242 N.Y. 134 (1926);
> *In the Arbitration Proceedings of Perfect Fit Products Manufacturing Co.*, 161 N.Y.S. 2d 376 (Sup. Ct. N.Y. Co. 1957).

In *Perfect Fit, supra,* the seller mailed written confirmations to the buyer (in response to oral and written orders), which indicated thereon that the buyer would be bound to the conditions on the reverse side of those confirmations either by accepting the merchandise or by not rejecting the conditions set forth on those contracts in writing within ten days. One of the terms and conditions on the reverse side of the contracts provided for arbitration of controversies. The buyer did not reject any of the confirmations and, in some instances, merchandise was delivered. A dispute arose between the parties and when the seller attempted to arbitrate that dispute, the buyer opposed arbitration. The Court held the controversy was subject to arbitration based upon the buyer's acceptance, by its conduct, of the conditions found on the reverse side of the seller's confirmation.

To ascertain whether parties have entered into a contract and, if so, what the terms and conditions of that contract are, one often looks to the acts and conduct of the parties. When one does that in this case, one is immediately struck by the inconsistency of the position taken by Foster in this case. That is, Foster, through its counsel, prepares, executes, serves and files a written Demand for Arbitration in which it not only alleges the existence of a "written contract" containing a provision for arbitration of disputes, but also purports to quote, verbatim, the language of the arbitration clause found in that "written contract" and asks that such provision be modified to provide for arbitration in Philadelphia rather than New York City. Subsequently, Foster "withdraws" its Demand for Arbitration and when Knit-Away seeks to initiate its own arbitration, on the same disputes, Foster suddenly "discovers" that there is no "written contract" much less a "written contract containing a provision requiring arbitration". Of course, by Foster's commencement of the arbitration, we see that Foster itself acknowledged that it is indeed a party to written contracts requiring arbitration.

In this connection, we must call to the Court's attention that this is not the first time that this Court has been confronted with this kind of activity on the part of a litigant. In *Calvine Mills, Inc.* v. *L.A. Slesinger, Inc.*, 258 F. 2d 228 (2d Cir. 1958), Calvine initiated an arbitration proceeding and then, like Foster, thought better of the idea and tried to evade the consequences of its choice. This Court held that a party cannot thus play fast and loose either with the Court or with the other party and directed that arbitration between the parties proceed. This Court made short shrift of the argument that the parties had "never entered into a binding agreement to arbitrate" and stated: "This contention is without merit." *Id.* at 230.

In a somewhat circuitous fashion, Foster also seems to contend that its failure to manifest its acceptance of the Knit-Away contracts by utilizing one of the *other* alternative methods of acceptance, i.e., signing and returning Knit-Away's confirmations, establishes that it never agreed to arbitrate. In this connection, one is compelled to observe that although an agreement to arbitrate must be in writing,[8] there is no requirement that the agreement must be signed by either party.

> *Fisser* v. *International Bank*, 282 F. 2d 231 (2d Cir. 1960);
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> *In the Matter of the Arbitration of AAACON Auto Transport, Inc.* v. *Teafatiller*, 334 F. Supp. 1042 (S.D.N.Y. 1971);
>
> *In the Matter of Helen Whiting, Inc.*, 307 N.Y. 360 (1954);
>
> *Trafalgar Square Ltd.* v. *Reeves Bros., Inc.*, 35 A.D. 2d 194, 315 N.Y.S. 2d 239 (1st Dept. 1970);

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[8] The relevant provisions of the Federal Arbitration Act and the New York State Civil Practice Law and Rules provide as follows:

> "A party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The Court shall hear the parties, and . . . the Court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." Title 9 USC § 4.
>
> "A written agreement to submit any controversy thereafter arising . . . to arbitration is enforceable . . ." CPLR § 7501.
>
> "(a) Application to compel arbitration; stay of action. A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with . . . the Court shall direct the parties to arbitrate . . ." CPLR § 7503(a).

Braten Apparel Corp. v. Rutger Fabrics Corp., 35 A.D. 2d 921, 318 N.Y.S. 2d 771 (1st Dept. 1970);

Weinstein-Korn-Miller, N.Y. Civ. Practice, Vol. 8, ¶ 7501.08.

C. Not a Single Case Cited by Foster Supports the Proposition That in New York, as Between Merchants in the Textile Industry, an Arbitration Clause Contained in a Written Confirmation of an Oral Order Constitutes a Material Alteration.

Although Foster contends that an arbitration clause which appears in a contract between merchants is a material alteration of the contract, Foster has only cited two New York State cases,[9] both clearly distinguishable from the case at bar, to stand for that proposition. *Application of Doughboy Industries, Inc.*, 17 A.D. 2d 216, 233 N.Y.S. 2d 488 (1st Dept. 1962); *In re Associated Lerner Shops of America, Inc.*, 17 U.C.C. Rep. Ser. 348 (Sup. Ct. N.Y. Co. 1975).

In *Doughboy, supra,* arbitration was denied between parties who were *not* merchants in the *textile* industry and where there had been an exchange of a *written order* and a *written confirmation* containing conflicting printed provisions and disclaimers. Thus, the Court in *Doughboy* was

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[9] We will not even address ourselves to distinguishing those cases relied upon by Foster decided in Courts other than in New York for the reasons set forth in our Brief at pages 15 and 16, *supra*. We note, however, the natural reluctance which the State Courts of North Carolina and California as well as the Federal Court in Tennessee, apparently, have to compel residents of their states to arbitrate in New York. Indeed, Foster's citation to and quotation from the North Carolina case of *Frances Hosiery Mills, Inc.* v. *Burlington Industries, Inc.*, 14 U.C.C. Rep. Ser. 1110 (1974) in footnote 9 of its Brief (page 22) adequately capsulizes the true motive behind such decisions.

faced with a typical "battle of conflicting forms" situation which precluded the application of U.C.C. § 2-201(2) to the prejudice of either party, both of whom insisted that its printed form was paramount to that of the other.[10] Moreover, the comment that an arbitration clause is a material alteration under U.C.C. § 2-207 was merely dictum and wholly unnecessary to the determination of the Court. This is particularly so because at the time of the *Doughboy* decision the Uniform Commercial Code was not even in effect in New York. Furthermore, since *Trafalgar Square* was decided in 1970 (six years after the U.C.C. was adopted in New York and eight years after *Doughboy* was decided), it is clear that *Doughboy* is limited to the facts of that case. The First Department's subsequent unanimous decisions in *Braten Apparel, Loudon* and *Suits Galore* lends further support to the inapplicability of *Doughboy* to the case at bar.

The *Lerner* case, is the only New York decision cited by Foster where arbitration was not ordered between merchants in the textile industry; however, *Lerner* is clearly distinguishable from the instant case. In *Lerner,* the petitioner guaranteed the payment to respondent for certain merchandise which was delivered to a third party. The merchandise was not only delivered late but, in addition, allegedly delivered in a defective condition. Accordingly, the petitioner complained to the respondent. It was not until after the merchandise was delivered and a complaint had been made that a confirmation of the terms of the purchase (including an arbitration provision) was sent to the

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[10] *In the Matter of John Thallon & Co., Inc.,* 396 F. Supp. 1239 (E.D.N.Y. 1975) cited by Foster also involved a "battle of the forms" situation and did not involve merchants in the textile industry. Moreover, the purchaser neither accepted nor paid for nor used any of the meat. The case is clearly inapposite.

petitioner. Based upon the fact that the "written form of confirmation was received after the fabrics had been rejected" and it appeared that the petitioner rejected the contract, the Court granted the petitioner's motion to stay arbitration.[11]

The question of whether or not two parties have "made a contract" is not a matter of federal law but rather a matter of applicable state law, especially in a diversity case. In the Court below, both parties agreed that the applicable law on this question was the law of the State of New York. Thus, reliance by Foster on *Dorton* v. *Collins & Aikman Corporation*, 453 F. 2d 1161 (6th Cir. 1972) is misplaced since it is abundantly clear that the Circuit Court in that case was seeking to ascertain what the state law of Tennessee was and, concededly, the law of the State of Tennessee in this regard may indeed be different from the law of the State of New York.[12] Even if this case were not governed by New York law, it is hard to understand how Tennessee law became applicable. Moreover, the Court in *Dorton* recognized that even if the arbitration clause did materi-

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[11] It is noteworthy that the Court indicated an awareness of *Trafalgar Square* and *Better Togs, supra*. The Court distinguished *Lerner* from those cases on the ground that in *Trafalgar Square* and *Better Togs*, "the buyer received the seller's confirmation *prior* to delivery, retaining same without objection." (Emphasis supplied.) 17 U.C.C. Rep. Ser. at 349.

[12] It is noteworthy that the New York State Supreme Court refused to stay arbitration proceedings instituted by Collins & Aikman Corporation under and pursuant to the identical form of contract involved in the *Dorton* v. *Collins & Aikman Corporation* case. The Supreme Court, relying upon *Whiting* and *Trafalgar Square, supra*, held:

> "The receipt and retention of the contracts without objection within 10 days after receipt thereof establishes the existence of written agreements to arbitrate." *Leon of Paris Co., Inc.* v. *Collins & Aikman Corporation*, N.Y.L.J. p. 17, May 4, 1972.

ally alter the contract, it would become a part of the contract if it was "expressly agreed to." *Id.* at 1169. Nowhere in its Brief does Foster suggest that it cannot be compelled to arbitrate if it "expressly assented" to arbitrate disputes with Knit-Away. We respectfully submit that Foster could not have possibly manifested its assent to arbitrate disputes with Knit-Away in any clearer manner than by its institution of arbitration proceedings against Knit-Away by service of a Demand for Arbitration which was subscribed by Foster's attorneys on its behalf.

D. A Legend on the Face of a Contract to the Effect that it Contains a Provision for Arbitration of Disputes Binds the Parties to Arbitrate Even if the Full Arbitration Provision is Contained only on the Reverse Side of that Contract, Particularly Where There is a Notation on the Face of the Contract that the Terms and Conditions thereof are Contained on the Reverse Side.

Foster's counsel contend in their Brief to this Court that Foster was not aware that the series of twenty contracts which Foster received over a period of five months contained a provision requiring arbitration of any disputes arising under such contracts. *There is no support for this argument in the record* of proceedings below. The Court will search in vain to find anything in Foster's answer (97a-100a) or in the affidavit of Foster's President (123a-127a) which states, or implies, that Foster did not read any of the twenty contracts or that Foster did not see or understand the arbitration clause.

All we have is Mr. Foster's conclusory statement (which cannot possibly raise any triable issue) that "no agreement to arbitrate with Knit-Away has ever been entered into by Foster, either orally or in writing" (124a). It is, of course, one thing to say, as Foster does, that a written document

does not, in law constitute an agreement, and quite another to say that one or the other party was not aware of its contents or did not read it.[13]

In point of fact, any claim by Foster that it was unaware of the existence of the arbitration clause in the twenty contracts is incredible and conclusively refuted by the documentary proof. It will be remembered that Foster itself started an arbitration by service of a written Demand for Arbitration, in which Demand Foster alleged not only the existence of a "written contract" requiring arbitration, but also purported to quote, verbatim, the arbitration clause. Foster can never explain how it can, on the one hand, claim that it was unaware of the existence of a written contract containing a provision for arbitration while, on the other hand and earlier, it serves and files a document which alleged not only the existence of such a written contract but also purports to quote, verbatim, the arbitration provision therein, and seeks to obtain a modification thereof.

In any event, the cases make it clear that a party is legally bound by a contractual arbitration provision (even where that arbitration provision is on the reverse side of a contract) so long as the front of the contract either refers to the provision for arbitration or makes it clear that there are terms and conditions on the back of the contract. The law simply does not permit a party to refuse to read a document which it has in its possession and later claim that it was unaware of what the document said. In *Application of Central States Paper & Bag Co. Inc.*, 132 N.Y.S. 2d 69 (Sup. Ct. N.Y. Co. 1954), *aff'd.* 134 N.Y.S. 2d 271 (1st Dept. 1954), the Court had before it a written confirmation of a

[13] Since Foster did not allege in the District Court that it was unaware of the existence of the arbitration provision, it cannot make that argument in this Court (see pages 15-16, *supra*).

sale. The written confirmation, *unlike the ones involved in this case*, did *not* set forth on the face thereof that there was a provision for arbitration to be found on the back of the document. The only thing on the face of the document was a notation that it was subject to the provisions to be found on the back of the confirmation. The Supreme Court nevertheless held (and was affirmed by the Appellate Division) that this constituted sufficient notice of the existence of an arbitration clause on the back of the contract and required arbitration of disputes in accordance with the arbitration provision. *See also Society Brand Hat Co.* v. *Felco Fabrics Co.*, 92 F. Supp. 499 (S.D.N.Y. 1950).

In the case at bar, not only did the face of the contract refer to terms and conditions on the back of the contract, but it also contained the statement that: "This confirmation is given subject to all of the terms and conditions on the face and reverse sides hereof, *including the provisions for arbitration* . . ." (Emphasis supplied.) It is thus seen that the case of *Arthur Philip Export Corporation* v. *Leatherstone, Inc.*, 275 A.D. 102. 87 N.Y.S. 2d 665 (1st Dept. 1949), is inapplicable for several reasons. First, unlike the case at bar, *Leatherstone* involved an exchange of conflicting forms. Second, there is only an inconspicuous reference on the face of the contract (in small type and in parenthesis) stating "see also back".

E. There is Ample Evidence Presented From Which the District Court Could Determine Whether or Not a Valid Agreement to Arbitrate Existed and a Trial of the Question was Totally Unnecessary.

Nowhere in Foster's answer nor in the affidavit of its President did Foster suggest that the District Court could not make a determination of the issue without a plenary trial, nor do the cases cited by Foster to this Court indicate

that the District Court should have held such a trial. Even if Foster could make that argument in this Court, it has cited no authority for the proposition that on the facts here presented, a trial was necessary. The cases which Foster cites where a trial was ordered (which have not already been distinguished) are either pre-Code cases,[14] or cases where there was a battle of the forms,[15] or consumer lessee transactions,[16] or cases where there was no reference on the front of the contract to the existence of the arbitration provision,[17] or cases where the arbitration clause arguably did not apply to the specific transaction,[18] or cases which did not involve merchants in the textile industry.[19]

Thus, none of the cases cited by Foster in support of its position that if Knit-Away's petition is not dismissed, a trial should be held, involve a New York State Code-covered transaction between merchants in the textile industry. In our case, Foster's agreement to arbitrate disputes is established by the facts and the law (see Point I, page 16 to 22, *supra*) and by its own commencement of an arbitration proceeding.

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[14] *Matter of the Application of Eimco Corp.*, 163 N.Y.S. 2d 273 (Sup. Ct. N.Y. Co. 1957); *In the Matter of the Arbitration of Stein Hall & Co.*, 177 N.Y.S. 2d 603 (Sup. Ct. N.Y. Co. 1958).

[15] *Eimco, supra; Stein, supra.*

[16] *Tri-City Renta-Car and Leasing Corp.* v. *Vaillancourt*, 33 A.D. 2d 613, 304 N.Y.S. 2d 682 (3d Dept. 1969).

[17] *Eimco, supra; Stein, supra.*

[18] *Eimco, supra.*

[19] *In re Wolfkill Feed & Fertilizer Corp.*, 16 U.C.C. Rep. Ser. 1188 (Sup. Ct. N.Y. Co. 1975).

POINT II

Based upon the frivolous nature of Foster's appeal, Knit-Away should be awarded counsel fees and double costs together with disbursements.

Rule 38 of the Rules of Appellate Procedure provides:

> "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

In addition, 28 U.S.C. Section 1912 provides:

> "Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."

It is well settled that pursuant to both of the above-cited statutes, the courts of appeal allow damages, attorney's fees and other expenses incurred by an appellee if the appeal is frivolous without requiring a showing that the appeal resulted in delay.

> *Clarion Corp.* v. *American Home Products Corp.*, 494 F. 2d 860 (7th Cir.), *cert. den.* 419 U.S. 70 (1974) —(Rule 38 is designed to penalize litigants for taking frivolous appeals and to compensate an appellee who has been put to the expense of answering such a wholly frivolous appeal);
>
> *Fluoro Electric Corp.* v. *Branford Associates*, 489 F. 2d 320 (2d Cir. 1973)—(Rule 38 is not premised on a showing of delay in prosecuting an appeal but rather to do justice between the parties and to penalize a party for unnecessarily wasting the time and resources of the court.);

Oscar Gruss & Son v. *Lumbermens Mutual Casualty Company*, 422 F. 2d 1278 (2d Cir. 1970)—("In view of the superfluity of issues on appeal, the frivolity of almost all of them, and the briefing of many in a manner that simply ignored the abundant evidence . . . we exercise our discretion under the statute" and award the appellee "an additional four per cent interest on the judgment appealed from, double costs on Lumbermens' appeal, and $7,500 in attorney's fees.");

Dunscombe v. *Sayle*, 340 F. 2d 311 (5th Cir.), *cert. den.* 382 U.S. 814 (1965)—("As announced from the bench, this appeal is dismissed. It is patently a frivolous appeal.");

Ginsburg v. *Stern*, 295 F. 2d 698 (3d Cir. 1961)—(After finding no merit in the appeal the Court awarded the appellee the costs of printing together with counsel fees and other expenses necessarily incurred.);

Lowe v. *Willacy*, 239 F. 2d 179 (9th Cir. 1956)—(Appellee awarded damages in the sum of double costs and an amount equal to attorney's fees on the appeal together with printing costs.);

See Advisory Committee Note to Rule 38.

Knit-Away respectfully submits that the multitudinous arguments advanced by Foster on this appeal are disingenuous, completely lacking in legal substance, without support in the record, and completely frivolous. This whole case boils down to the question of whether Foster agreed to arbitrate. As set forth in Point I, *supra*, the law is absolutely clear that on the facts here presented between

these merchants in the textile industry, there was in law a binding agreement to arbitrate. But even if one were to ignore the applicable legal authorities, one would still have to find that Foster "agreed to arbitrate" because it manifested its assent to such agreement when it started its own arbitration against Knit-Away. Therefore, in the context of what occurred here, Foster's appeal is utterly and completely frivolous, involves unnecessary costs and expense to Knit-Away and constitutes an imposition on the Judges of this Court and on their time. No clearer case for applying Rule 38 can be imagined. Knit-Away therefore respectfully requests:

1. That this Court affirm the Order of the District Court; and

2. That such affirmance be with double costs and disbursements to Knit-Away together with counsel fees in such amount as this Court in its discretion deems appropriate.

In connection with the request for counsel fees, Knit-Away will be prepared on the argument of this appeal to submit an affidavit setting forth the actual time spent by its counsel in connection with this appeal and the dollar value of such time computed in accordance with Knit-Away's counsel's normal and customary charges to its clients.

CONCLUSION

In view of all of the foregoing, the Order and Judgment of the United States District Court for the Southern District of New York granting Knit-Away's petition should be affirmed and Knit-Away should be awarded double costs, its attorneys' fees on this appeal and disbursements, including, without limitation, the cost of printing its Brief.

Respectfully submitted,

OTTERBOURG, STEINDLER, HOUSTON & ROSEN, P.C.
Office and P.O. Address
230 Park Avenue
New York, New York 10017
(212) 679-1200

Of Counsel:
KURT J. WOLFF
DANIEL WALLEN